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IN THE

Supreme Court of the United States

October Term, 1964.

No. 258.

ALBERT STRITE and COMMONWEALTH TRUST COMPANY OF PITTSBURGH, Executors of the Estate of Lillian D. Cree, deceased,

Petitioners,

v.

EDGAR A. McGINNES, District Director of Internal Revenue,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit as of No. 14,461.

Reply Brief for Petitioners

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REPLY BRIEF FOR PETITIONERS.

The thrust of this "concise argument" is to the *reasons* for allowance of certiorari. May I quote from a few letters I have received:

"Dechert, Price & Rhoads (Philadelphia)

* * * * *

"I am very much interested in the *Strite* case and also in the point which is being raised by the estate tax examiners in Pittsburgh. I have discussed these questions with other lawyers in this office and plan to discuss them in the lectures on Powers of Appointment which I shall give for the Practicing Law Institute in New York on July 9 and August 6.

* * * * *

"George Craven"

"Foosaner, Saiber and Schlesinger (Newark)

* * * * *

"In lecturing before the Practising Law Institute in New York, I took occasion to refer to your case and the significance of its implication to some one hundred attorneys, trust officers, accountants and life underwriters in attendance.

* * * * *

"S. J. Foosaner."

"Lofit Publications, Inc.

* * * * *

"The concept of 'ascertainable standards' arises under a number of sections of the Internal Revenue Code and an authoritative analysis by the Supreme Court of the

inter-relationship of such sections would certainly be most helpful to the practising lawyer.

* * * * *

"J. Mertens."

"Homer I. Harris (New York)

* * * * *

"I have heard of no cases in New York in which the Service has taken the position that a power of invasion in a non-beneficiary trustee would result in the inclusion of the property in the beneficiary's estate. If it should be so held, it would *wreak havoc with invasion provisions generally.* (Emphasis supplied.)

* * * * *

"Homer I. Harris"

"Dear Mr. Harris:

"* * * I think that the *Strite* case is the cloud the size of a man's hand. To me, an 'ascertainable' standard is one which permits an actuarial computation; important for a charitable remainder under Section 2055, but having no bearing on the transfer of a property right—subject to an excise.

"The tax has been assessed and collected (by compromise) in Pittsburgh where there was a sole corporate trustee with discretionary powers because of this lack of an 'ascertainable' standard on the principle of law set forth in *Scott on Trusts*, (2nd Ed.), Section 187 et seq.

'Where the trustee refuses to act, the court may compel him to act:' 187.1.

'Although undoubtedly the trustee has considerable discretion in determining what is necessary for the beneficiary's support, there are limits to his dis-

cretion. It is true that the standard is not a fixed standard, but the trustee is guilty of an abuse of discretion if it appears to the court that he is paying less than a reasonable person could think necessary for the beneficiary's support.' 187.2 page 1386.

* * * * *

"Henry D. O'Connor"

The two cases cited by the respondent *actually support the petitioners* because they arise under what is now *Section 2038*, i.e., transfers of property by a decedent with the right retained by the decedent to alter, amend, or revoke; and in that section Congress has specifically provided that such right so retained "in whatever capacity exercisable" subjects the property transferred to the estate tax.

The property of Mary and Katherine was never the property of Lillian, no more than my property is my wife's property—perhaps even less so.

In *Hurd v. Commissioner*, 160 F. 2d 610 (C. A. 1st), the decedent transferred property to himself and his wife as trustees, and it was held that he retained the right to alter, amend, or revoke; in *Welch v. Terhune*, 126 F. 2d 695 (C. A. 1st), settlor transferred property to himself, his son, and his son-in-law, as trustees, the settlor to "be the active trustee," and here too it was held that he retained the right to alter, amend, or revoke because the Code makes such transferred property part of his estate if the settlor retains such right "*in whatever capacity exercisable.*" (Emphasis supplied by C. A. 1st.)

There is no such provision in Section 2041.

" 'Of all the exploits of Equity, the largest and the most important is the invention and development of the Trust.' So Professor Maitland was accustomed to tell his students.

* * * * *

"The trust, however, is a device for making dispositions of property. And no other system of law has for this purpose so flexible a tool. It is this that makes the trust unique.

* * * * *

The duties of the trustee are such as the creator of the trust may choose to impose; the interests of the beneficiaries are such as he may choose to confer upon them." *Scott on Trusts*, Sec. 1.

The Congress is aware of the law of trusts. Many sections of the Internal Revenue Code are devoted to trusts. We suggest that if Congress intended to tax "fiduciary powers",[1] i.e., "discretionary power to invade principal",[2] it would have said so in specific words and not by strained implication under the "legal or technical words"[3] "general power of appointment"—which it certainly is not.

Congress could have said:

"Sec. 2041½.

"*Fiduciary powers.* Where a fiduciary has discretionary power to invade a trust for the benefit of a life tenant, such trust shall be included in the gross estate of the life tenant."

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1 and 2 Finance Committee Report

3 **Strite v. McGinnes**, 330 F. 2d 234 (p. 20, Pet. for Cert.)

I will not attempt to compose a clause to include trusts where the discretionary power is to invade for the benefit of a widow *and/or* children. They are now collecting tax (by compromise) when the life tenant is only a widow.

The decedent was not a donor. She was co-trustee of Mary's and Katherine's estates. Here we have nieces and nephews who are willing to put up a fight. Many widows and children in the future will compromise in terrorem. Wills giving a trustee discretionary power to invade principal are common and advisable. Often the widow life tenant is co-trustee of her husband's estate. Such discretionary power, exercisable only if "necessary or advisable" is not *ascertainable*, and there is no reason it should be. Congress did not intend that "fiduciary power" *over some one else's property* should be taxable.

I think that unless certiorari is granted, many very able "average lawyers" will be embarrassed and many estates wrongly subjected to estate tax on property never at any time property of the decedent.

Respectfully submitted,

HENRY D. O'CONNOR,
Attorney for Petitioners.